

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

DOUGLAS P. WILBERGER,            )  
  )  
                          Plaintiff,        )  
  )  
                          v.                    )   Civ. No. 03-631-SLR  
  )  
LLOYD R. JOSEPH,                 )  
  )  
                          Defendant.        )

---

Douglas Wilberger, Lorain Correctional Facility, Grafton, Ohio.  
Pro se.

Michele D. Allen, Esquire, Assistant County Attorney, New Castle,  
Delaware. Counsel for Defendant.

---

MEMORANDUM OPINION

Date: April 25, 2005  
Wilmington, Delaware

  
ROBINSON Chief Judge

## I. INTRODUCTION

On July 9, 2003, pro se plaintiff Douglas P. Wilberger filed this action pursuant to 42 U.S.C. § 1983, against Lloyd R. Joseph ("Joseph") and Roy Otlowski ("Otlowski"). Plaintiff alleged that defendant Joseph violated his Fifth, Sixth and Fourteenth Amendment rights and his due process under the Delaware Constitution when defendant Joseph arrested him without probable cause. (D.I. 2 at 3) Plaintiff seeks compensation in the amount of one million dollars for mental distress, one hundred thousand dollars for cruel and unusual punishment, two hundred dollars a day for work lost and fifty dollars a day for the constitutional violations. (Id. at 4)

On August 8, 2003, plaintiff filed an amended complaint also naming Magistrate Judge Nelson ("Nelson") and Attorney General Jane Brady as defendants. (D.I. 8) On November 7, 2003, plaintiff filed a motion to amend, requesting leave to add Edmund Hillis ("Hillis") as a defendant. (D.I. 16) On February 27, 2004, this court dismissed the claims against defendants Nelson, Otlowski, Hillis and Brady as frivolous, thereby leaving only defendant Joseph. (D.I. 28 at 9) On August 18, 2004, defendant Joseph was served with the complaint. (D.I. 59)

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. Presently before the court is defendant's motion to dismiss. (D.I. 63) For the reasons stated below, the court

shall grant defendant's motion.

## II. BACKGROUND<sup>1</sup>

On May 9, 2003, defendant Joseph, a New Castle County police officer, submitted for judicial review a complaint and warrant for the arrest of plaintiff. In the affidavit accompanying the complaint, defendant averred the following:

On May 8, 2003, defendant was contacted by Francis J. Veltre ("Veltre"). Veltre reported to defendant that, earlier that day, Jeremy B. Johnson ("Johnson") asked Veltre whether he was interested in purchasing a .45 caliber semi-automatic pistol he was selling for a friend from Ohio. (D.I. 8) Defendant immediately asked Veltre to arrange a meeting with Johnson at the Brookside Texaco ("Texaco") on Route 4 and Marrows Road, Newark, Delaware. Defendant and other New Castle County police officers observed Johnson arrive at the Texaco in a green Acura Legend, as expected, between 7:25 and 7:45 p.m.. (Id.) Defendant and the other officers stopped the vehicle and made contact with the four male occupants inside, Johnson, David L. Rife ("Rife"), Jason R. McKinley ("McKinley") and plaintiff. The car was searched and a Kimber .45 caliber semi-automatic pistol "serial #KSF1022" was recovered from the trunk. (D.I. 8) The four occupants were then taken into custody and transported to the New Castle County

---

<sup>1</sup> The facts related herein are taken from plaintiff's pleadings and attachments thereto.

Police Department where they were interviewed. (Id.)

During the interviews, it was established that on May 8, 2003, plaintiff went to Johnson's home and asked Johnson to sell the pistol for him. (Id.) McKinley agreed to give plaintiff and Johnson a ride to the Texaco to meet with Veltre. (Id.)

Plaintiff showed the gun to McKinley and Rife and then placed the gun in the trunk of the green Acura.<sup>2</sup> A search of the NCIC computer records was conducted, revealing that plaintiff was a convicted felon and parolee from Ohio and, thereby, prohibited from possessing a weapon.<sup>3</sup> (Id.)

Plaintiff alleges that he was detained by defendant at 7:30 p.m. on May 8, 2003 and was not interviewed until 2:00 a.m. May 9, 2003, in violation of his due process rights under the Delaware Constitution. (D.I. 16 at 2) On May 9, 2003, at 6:19 p.m., an arrest warrant signed by Judge Paul Smith, a Justice of the Peace, was issued for plaintiff and was executed by defendant. (D.I. 16) Plaintiff was charged with: (1) possession of a deadly weapon by a person prohibited; (2) attempted giving of a firearm to a person prohibited; and (3) endangering the welfare of a child, contributing to the delinquency of a child under the age of eighteen. (Id.)

---

<sup>2</sup> Rife claimed that plaintiff tried to sell the pistol to him for two hundred dollars. (D.I. 8)

<sup>3</sup> In 1994, plaintiff pled guilty to a felony assault which occurred in Cleveland, Ohio.

On May 21, 2003, defendant submitted another affidavit in support of an arrest warrant for plaintiff. In this affidavit, defendant averred that the gun taken from the green Acura on May 8, 2003, was stolen by plaintiff in April 2003 from a Newark resident. The gun was identified in this affidavit as a Kimber .38 super caliber target semi-automatic pistol "serial #KSF1022".

Plaintiff generally alleges that defendant violated his Miranda rights during the May 9, 2003 interview by taping the interview after he stated he had nothing further to say. Plaintiff also alleges that defendant lied in his sworn affidavits and testimony by averring that the gun was taken from plaintiff's possession<sup>4</sup>, had his fingerprints on it, and was a .45 caliber (rather than a .38 caliber) semi-automatic pistol<sup>5</sup>. On December 2, 2003, the State of Delaware entered nolle prosequi on all four charges. (D.I. 52)

### III. STANDARD OF REVIEW

In analyzing a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. See Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir. 1998). "A complaint should be dismissed only if, after accepting as true all of the

---

<sup>4</sup> The gun was taken from the trunk of the car.

<sup>5</sup> The serial number of the gun was consistently described.

facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint." Id. Claims may be dismissed pursuant to a Rule 12(b)(6) motion only if the plaintiff cannot demonstrate any set of facts that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The moving party has the burden of persuasion. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

#### **IV. DISCUSSION**

In his complaint, plaintiff alleges that defendant violated his state and federal constitutional rights by arresting him without probable cause. Defendant asserts that plaintiff's complaint should be dismissed for failure to state a claim upon which relief can be granted because, among other things, he is entitled to qualified immunity and plaintiff has failed to prove any of the elements required for malicious prosecution under § 1983. (D.I. 63)

##### **1. Qualified Immunity**

An officer charged with unconstitutionally applying for an arrest warrant can be entitled to qualified immunity. Malley v. Briggs, 475 U.S. 335, 340-343, (1986). The doctrine of qualified immunity protects an officer from suit if his actions were objectively reasonable. Id. at 344. In the case at bar, the

appropriate question is whether a "reasonably well-trained officer would have known that the affidavit in support of the arrest warrant failed to establish probable cause and that he should not have applied for the warrant." Id. at 345. "Only where the application is so lacking in indicia of probable cause, as to render official belief in its existence unreasonable, will the shield of immunity be lost." Id.

"The substance of all definitions of probable cause is a reasonable ground for belief of guilt." Brinegar v. United States, 338 U.S. 160, 175 (1949). Probable cause to obtain an arrest warrant exists "where the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." Id. at 175-6.

Here, defendant is entitled to qualified immunity and is accordingly protected from suit because his actions were objectively reasonable. The record indicates that Veltre provided defendant with reliable, nonpublic, inside information on the transaction, such as the type of pistol, the color, make and model of the car, and the location of the meeting. The information was then corroborated by defendant and other New Castle County police officers. The police station interviews of the four males further substantiated Veltre's information.

Considered in its entirety, defendant did not violate plaintiff's constitutional rights; rather, defendant had reasonably trustworthy information warranting a belief that a crime was committed. Accordingly, plaintiff's claim shall be dismissed due to defendant's qualified immunity.

## **2. Malicious Prosecution**

In the Third Circuit, plaintiff must allege, at a minimum, the following factors in order to establish a claim for malicious prosecution under 42 U.S.C. § 1983: (1) the deprivation of liberty, Albright v. Oliver, 510 U.S. 266, 274 n.4 (1994); (2) an absence of probable cause, Montgomery v. De Simone, 159 F.3d 120, 124 (3d Cir. 1998); and (3) termination or reversal of the criminal proceeding by reason of plaintiff's innocence, Heck v. Humphrey, 512 U.S. 477, 484 (1994).

In the case at hand, it is undisputed that defendant, a police officer, is a person acting under the color of State law. In his complaint, plaintiff alleges that defendant lied in the affidavit used to obtain the warrant leading to his arrest. As previously stated, plaintiff's allegations indicate that defendant reasonably concluded plaintiff committed a crime. In addition, the criminal proceedings brought against plaintiff were dismissed because the State of Delaware entered nolle prosequi on



all four charges against him.<sup>6</sup> (D.I. 52) Accordingly, plaintiff's malicious prosecution claim is dismissed.

**V. CONCLUSION**

For the reasons stated, the court will grant defendant's motion to dismiss. An order consistent with this opinion shall issue.

---

<sup>6</sup> As a result of the entry of nolle prosequi, the Superior Court of the State of Delaware never ruled on plaintiff's motion for acquittal. (D.I. 52)

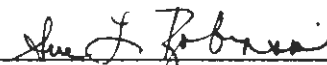
FOR THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

DOUGLAS P. WILBERGER,            )  
  )  
                          Plaintiff,        )  
  )  
                          v.                 ) Civ No. 03-631-SLR  
  )  
  )  
LLOYD R. JOSEPH,                 )  
  )  
  )  
                          Defendant.        )

O R D E R

At Wilmington this *25<sup>th</sup>* day of April, 2005, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that defendant's motion to dismiss (D.I. 63) is granted.

  
\_\_\_\_\_  
United States District Judge